

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

06 RICHARD JOHN KING,) CASE NO. C07-1562-BHS
07 Petitioner,)
08 v.) REPORT AND RECOMMENDATION
09 MAGGIE MILLER-STOUT,)
10 Respondent.)

)

INTRODUCTION AND SUMMARY CONCLUSION

13 Petitioner is a state prisoner who is currently incarcerated at the Airway Heights
14 Corrections Center in Airway Heights, Washington, pursuant to a 1993 judgment and sentence
15 of the King County Superior Court. He has filed a petition for writ of habeas corpus under 28
16 U.S.C. § 2254 seeking to challenge that judgment and sentence. At this Court's direction,
17 respondent filed an answer to the petition together with relevant portions of the state court record.
18 The briefing is now complete, and this matter is ripe for review. This Court, having reviewed the
19 petition, respondent's answer thereto, and the balance of the record, concludes that petitioner's
20 federal habeas petition should be denied and this action should be dismissed with prejudice.

FACTS

²² The Washington Court of Appeals summarized the relevant facts and procedural history

01 of petitioner's state court criminal proceedings as follows:

02 On September 28, 1993, Richard King entered an Alford¹ plea to one count
 03 of first degree rape and one count of first degree robbery based on an incident on June
 04 14, 1993, and to one count of first degree rape with a deadly weapon and one count
 05 of first degree robbery with a deadly weapon based on an incident on September 2,
 06 1992. In discussing the potential sentence at the plea hearing, the prosecutor stated:

07 In addition to the time you will be serving in prison, the judge will sentence
 08 you to community placement. That will be for at least one year. I believe that
 09 the judge could go as high as two years, since this is a sex offense. Two years
 10 would be the maximum the judge could put you on community placement.

11 King's plea statement stated that "[t]he court may read the original and
 12 supplemental affidavit of Probable Cause to determine a factual basis to take this plea
 13 and for sentencing." These affidavits stated that in the June 14, 1993 incident, King
 14 "displayed a kitchen-type knife with an approximately eight-inch blade" and that King
 15 "was on Department of Corrections community custody for ... Attempted Rape when
 16 he committed his alleged acts of June 14, 1993," that "[i]n June 1992, [King] was
 17 transferred to community custody" after serving time in prison for attempted rape,
 and that "[t]he knife was approximately six inches long."

18 The State's calculation of King's offender score utilized the fact that he was
 19 on community placement when the crimes occurred. King exercised his right of
 20 allocution at sentencing. The court imposed concurrent high-end sentences for counts
 21 I, II and IV, to run consecutively with the sentence for count III. Defense counsel
 22 acknowledged that such a sentence was required by the Sentencing Reform Act of
 1981 (SRA). The court did not state the specific term of community placement. The
 Judgment and Sentence included the statutory requirement that King's sentence for
 these sex offenses include "community placement for two years or up to the period
 of earned release awarded pursuant to RCW 9.94A.150(1) and (2) whichever is
 longer."

23 King voluntarily withdrew his direct appeal in 1994. Years later, King filed
 24 a motion to amend the Judgment and Sentence under CrR 7.8. The trial court denied
 25 the motion on March 19, 2001. On appeal, the State conceded that the trial court
 26 erred in failing to specify the term of community placement. This court remanded for
 entry of the correct period of community placement.

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 28 ¹ [Court of Appeals footnote 3] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27
 L.Ed.2d 162 (1970)

01 King argued for the first time at the hearing on remand that he had entered his
02 Alford plea based on the prosecutor's statement that the maximum community
03 placement term would be two years, and that because of this mutual mistake
04 regarding the direct consequences of his plea, he should be able to receive specific
05 performance of the two year community placement term. After King's attorney raised
06 this issue, the following occurred:

07 THE COURT: Isn't there a difference between what the State recommends
08 and what Mr. King asks the court to do and ultimately what the sentencing
09 judge decides to do? The judge isn't bound by the –

10 THE DEFENDANT: Your Honor, may I respond to that?

11 THE COURT: No, you can't, actually, you have got an attorney.

12 THE DEFENDANT: Okay.

13 The court further stated:

14 [T]he issue to me is what am I going [to] do now, and . . . to the extent that
15 I have discretion on remand, I would exercise my discretion and impose the
16 longest term I could.

17 The court entered an Order Modifying Judgment and Sentence stating that under the
18 pertinent statutes, King was subject to "a potential maximum period of Community
19 placement of 42 months under Count I."

20 (Dkt. No. 15, Ex. 3 at 2-4.)

21 Petitioner appealed the Superior Court's order modifying his judgment and sentence to the
22 Washington Court of Appeals. (*See id.*, Ex. 12.) The Court of Appeals affirmed petitioner's
sentence but remanded the matter back to the trial court with instructions that an incorrect
statement regarding good time credit be stricken from the judgment and sentence. (*Id.*, Ex. 3 at
7.) Petitioner filed a motion for reconsideration, but that motion was denied. (*Id.*, Exs. 15 and
16.)

23 Petitioner next filed a petition for review in the Washington Supreme Court. (*Id.*, Ex. 17.)

01 The Washington Supreme Court denied review without comment. (*Id.*, Ex. 18.) The Court of
02 Appeals issued its mandate terminating review on February 2, 2007. (*Id.*, Ex. 19.) Petitioner now
03 seeks federal habeas review of his sentence.

04 **GROUND FOR RELIEF**

05 Petitioner asserts the following five grounds for relief in his federal habeas petition:

06 **Ground one:** My state and federal constitutional rights to a jury trial and to due
07 process of law were violated when the sentencing court elevated the maximum
08 possible penalty based on a finding that I was on community placement at the time of
the offense.

09 **Ground two:** My state and federal constitutional rights to a jury trial and to due
10 process of law were violated when the sentencing court imposed consecutive
sentences based on a factual finding that my crimes were “separate and distinct.”

11 **Ground three:** Where sentencing error was predicated on the parties’ mutual
mistake of law, the sentencing court erred in denying me my choice of remedies.

12 **Ground four:** My state and federal constitutional rights to a jury trial and to due
13 process of law were violated when the sentencing court imposed a deadly weapon
enhancement on Count 3 based on a judicial finding that I was armed with a deadly
14 weapon during the crime’s commission.

15 **Ground five:** I did not knowingly, intelligently, and voluntarily waive my right to
have the sentencing court determine whether I was armed with a deadly weapon
during the commission of Count 3 because I was not advised in my Alford plea of my
16 right to a jury determination of the enhancement.

17 (Dkt. No. 4 at 9-11, and 13.)

18 **DISCUSSION**

19 Respondent concedes in her answer to the petition that petitioner exhausted his first,
20 second and fourth grounds for federal habeas relief. Respondent asserts, however, that petitioner
21 failed to fully and fairly exhaust his third and fifth grounds for relief. This Court need not address
22 the exhaustion questions posed by petitioner’s third and fifth grounds for relief because failure to

01 exhaust does not necessarily preclude review by this Court. Section 2254(b)(2), provides that
02 “[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the
03 failure of the applicant to exhaust the remedies available in the courts of the State.” As explained
04 in more detail below, this Court deems petitioner’s third and fifth grounds for relief to be without
05 merit and therefore subject to denial even absent exhaustion.

Standard of Review

On federal habeas review, state court judgments carry a presumption of legality and finality. *McKenzie v. McCormick*, 27 F.3d 1415, 1418 (9th Cir. 1994), citing *Brech v. Abrahamson*, 507 U.S. 619, 633 (1993). A writ of habeas corpus may issue only upon a finding that a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3).

Under the Anti-Terrorism and Effective Death Penalty Act, a habeas corpus petition may be granted with respect to any claim adjudicated on the merits in state court only if the state court's decision was *contrary to*, or involved an *unreasonable application* of, clearly established federal law, as determined by the Supreme Court, or if the decision was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d) (emphasis added).

Under the “contrary to” clause, a federal habeas court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362 (2000). Under the “unreasonable application” clause, a federal habeas court may grant the writ only if the state court identifies the

01 correct governing legal principle from the Supreme Court's decisions but unreasonably applies that
 02 principle to the facts of the prisoner's case. *Id.* The Supreme Court has made clear that a state
 03 court's decision may be overturned only if the application is "objectively unreasonable." *Lockyer*
 04 *v. Andrade*, 538 U.S. 63, 69 (2003).

05 Ground One

06 Petitioner asserts in his first ground for relief that his constitutional rights to a jury trial and
 07 to due process were violated when the trial court elevated the maximum possible penalty for his
 08 offense based on a finding that he was on community placement at the time of his offense.
 09 Petitioner maintains that because this finding increased his offender score and, thus, his sentencing
 10 range, the fact of his community placement had to be proven to a jury beyond a reasonable doubt.

11 In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that "any fact
 12 that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted
 13 to a jury and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. In *Blakely v.*
 14 *Washington*, 542 U.S. 296 (2004), the Supreme Court explained that "the 'statutory maximum'
 15 for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the*
 16 *facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 542 U.S. at 303
 17 (emphasis in original). The Court went on to explain that "[i]n other words, the relevant 'statutory'
 18 'maximum' is not the maximum sentence a judge may impose after finding additional facts, but the
 19 maximum he may impose *without* any additional findings." *Id.* at 303-4 (emphasis in original).

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 21 The Washington Court of Appeals rejected petitioner's claim that the trial court erred in
 22 using the fact that petitioner was on community placement in determining his sentence. (See Dkt.

01 No. 15, Ex. 3 at 5.) The Court of Appeals explained that because petitioner had specifically
02 allowed the trial court to use the original and supplemental affidavits of probable cause “to
03 determine a factual basis to take this plea and for sentencing,” neither *Apprendi* nor *Blakely*
04 required that a jury find the facts relied upon by the trial court in determining petitioner’s sentence.
05 (*See id.*)

06 Petitioner fails to demonstrate that this decision of the Washington Court of Appeals was
07 contrary to, or constituted an unreasonable application of, clearly established federal law. The
08 record is clear that petitioner expressly consented to the trial court’s use of the facts set forth in
09 the original and supplemental affidavits of probable cause in determining petitioner’s sentence.
10 (*Id.*, Ex. 20 at 5 and Ex. 23 at 19.) Among the facts set forth in those documents were that
11 petitioner was on community custody at the time he committed all of the offenses charged in the
12 amended information. (*Id.*, Ex. 22.) The trial court’s reliance on the fact that petitioner was on
13 community custody in determining petitioner’s offender score therefore did not violate the
14 principles announced in *Apprendi* and *Blakely*. Accordingly, petitioner’s federal habeas petition
15 should be denied with respect to his first ground for relief.

16 Ground Two

17 Petitioner asserts in his second ground for federal habeas relief that his constitutional rights
18 to a jury trial and to due process were violated when the sentencing court imposed consecutive
19 sentences based on a factual finding that his crimes were “separate and distinct.” The Washington
20 Court of Appeals rejected this claim stating that “[t]he issue of the trial court’s consideration of

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01 the separate and distinct nature of the crimes in sentencing is controlled by State v. Cubias.²

02 In *Cubias*, the Washington Supreme Court concluded that the imposition of consecutive
03 sentences under state law, RCW 9.94A.589(1)(b), does not implicate the concerns addressed by
04 the United States Supreme Court in *Apprendi* and *Blakely* because the imposition of such
05 sentences does not increase the penalty for any single offense beyond the statutory maximum
06 provided for the offense. *State v. Cubias*, 155 Wn.2d 549, 556 (2005). Petitioner cites to no
07 United States Supreme Court precedent holding that consecutive sentences violate the principles
08 announced in *Apprendi* and *Blakely*, and this Court is aware of none.

09 Moreover, the record before this Court reflects that petitioner, in pleading guilty to each
10 of the charged offenses, admitted all of the facts necessary to support the sentence imposed by the
11 trial court. (See Ex. 15, Exs. 20 and 22.) Accordingly, petitioner's federal habeas petition should
12 be denied with respect to his second ground for relief.

13 Ground Three

14 Petitioner asserts in his third ground for relief that the sentencing court, on remand, erred
15 in sentencing him to 42 months of community placement because the parties reasonably, though
16 mistakenly, believed that petitioner's maximum term of community placement would be two years,
17 and because petitioner was advised at the time he entered his plea that the maximum term of
18 community placement would be two years. Petitioner maintains that this mutual mistake of law
19 entitled him to specific performance of the term of community placement discussed at the time he
20 entered his guilty plea.

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22 ² [Court of Appeals footnote 8] 155 Wn.2d 549, 120 P.3d 929 (2005).

01 Federal habeas relief does not lie for errors of state law. *Lewis v. Jeffers*, 497 U.S. 764,
02 780 (1990)(citing *Pulley v. Harris*, 465 U.S. 37, 41 (1984)). It is not the province of federal
03 habeas courts to re-examine state court conclusions regarding matters of state law. *Estelle v.*
04 *McGuire*, 502 U.S. 62 (1991); *Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (9th Cir. 1993), cert.
05 denied, 510 U.S. 1191 (1994). The state courts, in this instance, determined that petitioner was
06 not entitled to specific performance as a matter of state law. Petitioner offers no compelling
07 constitutional argument nor, in fact, any constitutional argument at all, to establish that federal
08 habeas review of this claim is warranted. Accordingly, petitioner’s federal habeas petition should
09 be denied with respect to his third ground for relief.

Ground Four

Petitioner asserts in his fourth ground for relief that his constitutional rights to a jury trial and to due process were violated when the sentencing court imposed a deadly weapon enhancement with respect to count III of the information based on a judicial finding that he was armed with a deadly weapon during the commission of the crime. As noted in the discussion of petitioner's first ground for relief, petitioner expressly consented to the trial court's use of the facts set forth in the original and supplemental affidavits of probable cause in determining petitioner's sentence. (Dkt. No. 15, Ex. 20 at 5 and Ex. 23 at 19.) Among the facts set forth in the supplemental affidavit of probable cause was that petitioner was armed with a knife during the commission of the rape charged in count III of the amended information. (*Id.*, Ex. 22 at 6-8.) The trial court's reliance on the fact that petitioner was armed with a knife in imposing a deadly weapon enhancement with respect to count III of the amended information therefore did not violate the principles announced in *Apprendi* and *Blakely*. Accordingly, petitioner's federal

habeas petition should be denied with respect to his fourth ground for relief.

Ground Five

Petitioner asserts in his fifth ground for relief that he did not knowingly, intelligently, and voluntarily waive his right to have the sentencing court determine whether he was armed with a deadly weapon during the commission of count III because he was not advised during his plea proceedings of his right to a jury determination of the enhancement.

Due process requires that a guilty plea be both knowing and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). A guilty plea is voluntary only if the defendant was made fully aware of the direct consequences of the plea and the plea was not the result of threats, misrepresentations, or improper promises. *Brady v. United States*, 397 U.S. 742, 755 (1970). A guilty plea is intelligently made if the defendant was advised by competent counsel, was made aware of the true nature of the charges against him, and nothing in the record indicates that he was incompetent. *Id.* at 756. “[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.” *Id.* at 757.

At the time petitioner entered his guilty plea, the United States Supreme Court had yet to render its decisions in *Apprendi* and *Blakely*. Thus, it had yet to be established that petitioner had a right, arising under the Sixth Amendment, to a jury determination of the facts regarding the deadly weapon enhancement. *Brady* makes clear that petitioner cannot now challenge the validity of his guilty plea on the ground that he was not advised of rights which, at the time he entered his plea, had yet to be recognized. See *Brady*, 397 U.S. at 757. Accordingly, petitioner's federal habeas petition should be denied with respect to his fifth ground for relief.

CONCLUSION

For the reasons set forth above, this Court recommends that petitioner's federal habeas petition be denied and that this action be dismissed with prejudice. A proposed order accompanies this Report and Recommendation.

DATED this 25th day of March, 2008.

Mary Alice Theiler
Mary Alice Theiler
United States Magistrate Judge